

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

MICHAEL D HOVENGA  
16285 ROYAL AVE  
CLARKSVILLE IA 50619

TYSON FRESH MEATS INC  
c/o TALX UC EXPRESS  
P O BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10047-HT  
OC: 08/22/04 R: 03  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer, Tyson, filed an appeal from a decision dated September 9, 2004, reference 01. The decision allowed benefits to the claimant, Michael Hovenga. After due notice was issued a hearing was held by telephone conference call on October 8, 2004. The claimant participated on his own behalf. The employer provided a telephone number of (319) 236-9350 and the name of Dave Duncan. That number was dialed at 9:04 a.m. and the witness was not available. A message was left indicating the hearing would proceed without the employer's participation unless a representative called the toll-free number prior to the end of the hearing. By the time the hearing had ended at 9:17 a.m., no one on behalf of the employer had called and requested to participate.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Michael Hovenga was employed by Tyson from June 15, 2000 until August 19, 2004. He was a full-time maintenance person working 5:00 p.m. until 5:30 a.m.

On August 15, 2004, the claimant left work around 8:00 p.m. without punching out. He left the building to go to McDonalds. He had been authorized by his supervisor, Jimmy McIndowsky, to leave without punching out so he could go to McDonalds and get lunch for everyone. The claimant went to a nearby convenience store where he bought gas and cashed his paycheck when he had only been authorized to stop and get gas.

The claimant was questioned by human resources representatives on or about August 18, 2004, about his presence in the convenience store on Sunday evening and whether he had seen another employee, who was also on the clock, purchasing beer. He had seen the individual but had not seen what he purchased. He was asked to write a statement saying he had seen the other person buy beer but refused since he had no firsthand knowledge. The employer suspended him and discharged him the next day.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is not.

Iowa Code Section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or

incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). In the present case the employer did not participate to offer testimony as to the reason or reasons the claimant was discharged. The claimant asserted he had permission from his supervisor to leave the building without punching out and the reason he was fired was his refusal to write the statement regarding the other employee. Tyson has presented no evidence to rebut the claimant's testimony and has therefore not met its burden of proof. Disqualification may not be imposed.

DECISION:

The representative's decision of September 9, 2004, reference 01, is affirmed. Michael Hovenga is qualified for benefits provided he is otherwise eligible.

bgh/s